IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cr. No. 16-4566 JB
	)	
PETER CALVERT-CATA,	)	
	)	
Defendant.	)	

UNITED STATES' NOTICE OF INTENT TO OFFER EVIDENCE OF ACTS NOT CHARGED IN THE INDICTMENT PURSUANT TO THE FEDERAL RULES OF EVIDENCE 413 AND/OR 404(b), AND REQUEST FOR PRETRIAL RULING ON THE REQUEST TO ADMIT EVIDENCE

The United States gives notice that it may offer, during its case-in-chief, evidence described below as evidence of the charge in the Indictment and admissible evidence pursuant to Fed. R. Evid. 413, Fed. R. Evid 404(b) and other bases. In the interests of promoting a fair and orderly trial and minimizing the potential for prejudice to any party, the United States respectfully requests that this Court issue a pretrial ruling on the admissibility of the evidence described in this notice.

I. PROCEDURAL BACKGROUND

On December 7, 2016, a federal grand jury returned an Indictment against Defendant, charging him with two counts of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153, 2241(a) and 2246(2)(C). The Defendant was arraigned and on December 12, 2016 and entered a plea of not guilty. A jury trial is scheduled for February 6, 2017.

II. FACTS[1]

The United States may introduce evidence of the Defendant's alleged sexual-assault against another alleged victim (M.R.). The United States details the evidence as follows:

1. Discovery previously provided to Defendant including but not limited to 302s of Defendant and CDs of interviews, 302 of G. T., and 302 of M. R., indicate that Defendant allegedly committed sexual abuse of a minor (M. R.) under 18 U.S.C. § 2243(a) and/or sexual abuse under 18 U.S.C. § 2242(2).

2. The discovery outlines that Defendant allegedly committed a criminal sexual abuse of minor (M. R.), who had attained the age of 12 years but had not attained the age of 16 years, and was at least four years younger than Defendant when he engaged in the act.

3. The same discovery previously provided to Defendant also outlines that Defendant allegedly committed sexual abuse against M. R. by engaging in or attempting to engage in a sexual act with her while she was incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating willingness to engage in, that sexual act.

4. The alleged acts are said to have occurred in the early summer of 2016 at G. T.'s residence and involved heavy alcohol and marijuana consumption. The incident in the instant charged case with alleged victim B. M. occurred on August 13, 2016, just one to three months earlier at the same location, again involving alcohol and marijuana consumption. Initially Defendant denied ever being at G. T.'s residence at the same time as M. R. or B. M.

[1] The facts set forth are those the United States anticipates it will prove at trial. The United States acknowledges that facts may be in dispute.

5. M. R.'s year of birth is 2003. Defendant states that he thought M. R. was 14 or 15, and then he changed it to 16 years-old.

6. M. R. drank alcohol and smoked marijuana at G. T.'s house with Defendant, G. T. and another minor female. According to M. R., when G. T. and minor female left to go get more alcohol, Defendant carried M. R. to G. T.'s bedroom and put her on the bed. He then asked her if she had ever kissed a boy and she said no. He got on top of her and began kissing her. He then asked her if she ever had sex with a boy and she said no. He pulled down her shorts and underwear and pulled down his pants and underwear. It was at this point M. R. blacked out. At some later point, Defendant and G. T. took her outside to get air and she vomited. When they brought her back inside, she vomited again. The next day, M. R.'s vagina was sore and burned when she urinated.

7. G. T. was the one who disclosed to the agent Defendant's conduct with M. R. and confirms the aforementioned except he was not present during the alleged sexual act. G. T. does state that Defendant told him he did have sex with M. R. G. T. states that M. R. was 13 years-old at the time.

8. Defendant also admits to previously lying to agents about being at G. T.'s residence at the same time as M. R. or B. M. Defendant admits to having sex with M. R. and admits to attempting to have sex with B. M but claims it was consensual. He also states he wasn't able to or was not attracted to B. M.

9. In the instant case, according to B. M., she was also drinking and smoking marijuana with G. T. and Defendant at G. T.'s residence. She was intoxicated. According to B. M., she was in and out of consciousness due to alcohol consumption when Defendant sexually abused her and she couldn't move.

10. According to G. T., Defendant came into the bathroom while he and B. M. were having consensual sex and asked him to engage in a threesome. G. T. moved out the way while Defendant removed his clothes and began touching B. M. Defendant digitally penetrated B. M.'s vagina, and groped her breasts and buttocks, all while rubbing his penis in an attempt to get an erection. G. T. changed his mind about having a threesome and told Defendant to leave.

11. G. T. states that he and B. M. resumed having sex and when he finished, he went to his room and laid down. B. M. remained in the bathroom, sitting on the toilet with only a t-shirt and socks on. Defendant went into G. T.'s room and told him, "I'm going to try to fuck [B. M.] too." Defendant may have taken one of G. T.'s condoms and G. T. heard him enter the bathroom. Later, G. T. heard a thump/crashing sound come from the bathroom. G. T. went to the bathroom a short time later and found shower racks on the floor and B. M. sitting on the toilet with her t-shirt removed, and only had socks on. G. T., during the same interview, had also stated that when he went to check the bathroom, Defendant said "Hang on, hang on, hang on." When asked to explain the discrepancy, he could not.

III. ARGUMENT AND AUTHORITIES

Fed. R. Evid. 413 provides that in a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

A presiding trial court must find that the evidence sought to be introduced is relevant. *United States v. McHorse*, 179 F.3d 889, 896-97 (10th Cir. 1999) (citing *United States v. Guardia*, 135 F.3d 1326, 1328 (10th Cir. 1998)). Evidence is relevant if it "tends to make the existence of any fact" of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401; *United States v.*

Mendoza-Salgado, 964 F.2d 993, 1006 (10th Cir. 1992). A fact under Rule 401 is of consequence when its existence would provide the fact-finder with a basis for making some inference, or chain of inferences, about an issue that is necessary to a verdict. *Id.* The Rules' basic standard of relevance is a liberal one. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993). Even a minimal degree of probability -- i.e., "any tendency" -- to prove a fact at issue is sufficient to find the proffered evidence relevant. Fed. R. Evid. 401.

Subdivision (d) of Fed. R. Evid. 413 defines the offense of "sexual assault," as a crime under federal or state law involving:

> (1) any conduct proscribed by chapter 109A of the federal criminal code, (2) unconsented to contact between any part of the defendant's body or an object and another person's genitals or anus, (3) unconsented to contact between the defendant's genitals or anus and any part of another person's body, (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person, or (5) an attempt or conspiracy to engage in conduct which is otherwise covered by the definition.

Fed. R. Evid. 413(d).

In contrast to Rule 404(b), which only allows uncharged act evidence to be admitted on non-character theories of relevance, Rules 413 allows such evidence to be admitted and considered for its bearing "on any matter to which it is relevant." Hence, in addition to allowing admission on the basis of the non-character theories of relevance permitted under Rule 404(b),

Rules 413 allows the admission of uncharged offense evidence for the purpose of establishing propensity. The legislative sponsors explained:

> The new rules will supersede in sex offense cases the restrictive aspects of Federal rule of evidence 404(b). In contrast to rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant. This includes the defendant's propensity to commit sexual assault offenses, and assessment of the probability or

> improbability that the defendant has been falsely or mistakenly accused of such an offense.

See 140 Cong. Rec. S12990; *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998) ("Under Rule 413... evidence of a defendant's other sexual assaults may be admitted 'for its bearing on any matter to which it is relevant.' . . . Thus, Rule 413 supersedes Rule 404(b)'s restriction and allows the United States to offer evidence of a defendant's prior conduct for the purpose of demonstrating a defendant's propensity to commit the charged offense."); *see also United States v. Castillo*, 140 F.3d 874, 879 (10th Cir. 1998) (analyzing Rule 414); *United States v. Charley*, 189 F.3d 1251, 1260, 1271 (10th Cir. 1999).

Thus, in this case, the United States may introduce the evidence of the alleged sexual assault of M. R. by Defendant in B. M.'s case. M. R.'s alleged attack occurred during the early Summer of 2016, just a few weeks/months prior to B. M.'s attack, Defendant and G. T. supplied alcohol/marijuana to M. R. at G. T.'s house. Defendant and G. T. supplied alcohol to B. M. at G. T.'s house. Both girls were young, Defendant knew there is no parental supervision at G. T.'s residence during the day, Defendant knew he could party at the residence, and when the girls were drunk enough, he could sexually assault them. In M. R.'s case, she was intoxicated and blacked out during the assault. In B. M.'s case, she was intoxicated and was in and out of consciousness during the assault. Both girls could not appraise the nature of the conduct or physically decline participation in or communicate an unwillingness to engage in the sexual act.

Defendant's alleged similar sexual assault and behavior during the incidents with M. R. is evidence that he sexually assaulted B. M. The evidence sought to be admitted is relevant in that it certainly indicates that Defendant uses G. T.'s house, where there is no parental supervision during the day, to sexually abuse young girls who are intoxicated. As the congressional discussion that follows Fed. R. Evid. 413 indicates, the admissibility of propensity evidence (as contrasted with propensity concerns under Rule 404(b)) was clearly intended to be provided for.

Further, Rule 413 does not limit admission under Rule 404(b). In sex offense cases, evidence may be offered and admitted on both bases. *United States v. Meacham*, 115 F.3d 1488, 1490-91, 1495 (10th Cir. 1997) (admission proper under both 404(b) and 414); *United States v. Roberts*, 185 F.3d 1125, 1142-43 (10th Cir. 1999) (admission proper under both 404(b) and 413).

The sexual assault on M. R. is also admissible under Rule 404(b). It is admissible under Rule 404(b) because it is so related to the charged conduct that it serves to establish identity/motive/intent/common plan/preparation/opportunity and absence of mistake in sexually assaulting young intoxicated girls at G. T.'s residence. Defendant uses G. T.'s residence, where there is no parental supervision during the day, to sexually abuse girls who he helps get intoxicated, to the point that they are not able to physically resist any force, or appraise the nature of the conduct or physically decline participation in or communicate an unwillingness in the sexual act.

The incident with M. R. occurred one to three months before the incident with B. M. Initially, Defendant claimed he had never been to G. T.'s house at the same time as M. R. or B. M. Initially, Defendant denied ever meeting M. R., and initially he stated that he had met B. M. at outside occasions, like a baseball game. Defendant later admitted to having sex with M. R. and attempting to have sex with B. M. at G. T.'s house. The United States at this point does not know whether Defendant will revert back to his original denial of ever being at G. T.'s house at the same time as M. R. or B. M. during trial. His initial denials about being at G. T's house with both M. R. or B. M. demonstrate identity, absence of mistake, common plan, preparation, opportunity, motive and intent.

Moreover, according to G. T., the Defendant attempted to engage in a threesome with him and B. M. M. R.'s incident provides an initial basis/understanding as to the rise in Defendant's conduct and comfort level with G. T. and/or at G. T.'s residence after having sex with M. R. in G. T.'s house/room. A jury will not understand how Defendant can go from hanging out with G. T. or just being friends, to wanting to have a threesome with him and B. M., or having sex in his house in general, without this background information relating to M. R. coming into evidence.

The closeness in the timeline between the two assaults, the similarity of the two assaults, and the surrounding circumstances show identity/motive/intent/common plan/preparation/opportunity and absence of mistake. The proffered evidence has real probative value and its probative value outweighs the danger of unfair prejudice.

Under Rule 403, this Court must weigh the probative value of the proffered evidence against its potential for unfair prejudice. *United States v. Record*, 873 F.2d at 1375. The trial court is vested with wide discretion to balance possible unfair prejudice against probative value. *United States v. Bice-Bey*, 701 F.2d 1086, 1089 (4th Cir.), cert. denied, 464 U.S. 837 (1983); *United States v. Masters*, 622 F.2d 83, 87-88 (4th Cir. 1980). Evidence is not unfairly prejudicial simply because it is damaging to one's case. *United States v. Martinez*, 938 F. 2d 1078, 1082 (10th Cir. 1991). Rather, the evidence must have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.*

The United States' proffered evidence is prejudicial, but so is all relevant evidence adduced by the prosecution during the course of a criminal trial. The issue is whether the prejudice is unfair. In this case, it is not. The evidence may cause the jury to view Defendant in a less favorable light, but the evidence is not likely to produce a verdict based on emotions wholly apart from the jury's judgment as to the Defendants' guilt or innocence. The probative value of the evidence, which is great, outweighs the danger of unfair prejudice, and any prejudice can be moderated by cautionary instructions from the Court at the time of the admission of the evidence, and if requested, again in the final charge to the jury at the close of the case. *United States v. Record*, 873 F.2d at 1376.

The aforementioned probative value of admitting evidence of Defendant's alleged sexual assault against M. R. does outweigh danger of unfair prejudice. We have Defendant's initial denials and then partial admissions, testimony by both alleged victims, and testimony by witness G. T. who was present during parts of both incidents as they occurred in his residence. The proffered testimony will not confuse the issues, thereby misleading the jury. We are requesting the admission of one prior alleged sexual assault, testimony involving the same witness G. T., and evidence that will go towards credibility. Our case is dissimilar to *Guardia* which involved the United States' attempt to introduce four other sexual assaults in a two victim case, whose resolution of credibility issues alone would not have enabled the jury to decide whether the sexual act was proper because that case would have required expert testimony regarding each sexual act by a doctor during his practice. It would have created jury confusion because it would have turned the trial into 6 incidents, each requiring description by lay witnesses and explanation by expert witnesses. *United States v. Guardia*, 135 F.3d 1326, 1332 (10th Cir. 1998). There will be no jury confusion in our case. The evidence is admissible under Rule 403.

For all the above reasons, the United States respectfully requests that this Court allow the above-described evidence to be offered in the prosecution's case-in-chief. The United States seeks a pre-trial ruling on this motion.

Respectfully submitted,

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United States Attorney

Electronically filed on January 3, 2017

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I HEREBY CERTIFY that on January 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will cause a copy of this filing to be sent to counsel for Defendant.

/s/
LUCY SOLIMON
Special Assistant U.S. Attorney